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No. 09-861

Supreme Court, U.S.
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In The

Supreme Court of the United States

CITIZENS FOR POLICE ACCOUNTABILITY POLITICAL COMMITTEE, and FLORIDA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Petitioners,

v.

KURT S. BROWNING, in his official capacity as Secretary of State of the State of Florida, and SHARON L. HARRINGTON, in her official capacity as Supervisor of Elections, Lee County, Florida,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, consistent with *Burson v. Freeman*, 504 U.S. 191 (1992), Florida may restrict Election-Day petition gathering inside the limited geographic area 100 feet from a polling-place entrance.

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STATEMENT OF THE CASE AND FACTS

Florida, like other states, restricts petition gathering and other political activity near polling places. *See* Fla. Stat. § 102.031(4) (2009). Petitioners challenged the restriction, claiming it violated their First Amendment rights. The Eleventh Circuit upheld the law, recognizing Florida's compelling state interests and stressing "the short time (a few days a year) and small area (less than a football field) in which the Florida statute suppresses some political speech around the polls." (Pet. App. at 17a-18a.)[1] Petitioners seek certiorari review.

Petitioners are political organizations that hoped to amend the Fort Myers City Charter through a citizen initiative process. (R.1:¶¶ 1, 10, 11.) They required 2,508 petition signatures but were lacking approximately 800 as of August 2008, when this case began. (*Id.* ¶¶ 20-22.) Wanting to solicit the remaining signatures within 100 feet of polling-place entrances during the August 26, 2008 primary election (and subsequent elections), Petitioners sued Kurt S. Browning, in his official capacity as the Secretary of State of the State of Florida, and Sharon L. Harrington, in her official capacity as the Supervisor of Elections for Lee County, Florida (together, "Respondents"). (*Id.* ¶¶ 1, 2, 12, 13.)

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[1] References to the petition for writ of certiorari will be "(Pet. at [pg])." References to its appendix will be "(Pet. App. at [pg])." References to the district court record will be "(R.[docket number]:[page or paragraph])."

The case began with Petitioners' Verified Complaint and Motion for Preliminary Injunction, filed fifteen days before the August 26, 2008 primary election. (R.1:¶ 14; R.2.) Both sides filed witness declarations, and the district court heard argument, but there was no evidentiary hearing or live testimony. (R.2, Exh. A-B; R.9, 11, 15); *see also* M.D. Fla. R. 4.06(b) ("All hearings scheduled on applications for a preliminary injunction will be limited in the usual course to argument of counsel unless the Court grants express leave to the contrary . . . ."). Provided only a limited preliminary injunction record, the district court made few factual findings. But it concluded that, "at this stage of the proceedings, there has not been a sufficient showing that the restriction on exit petitioning is necessary." (Pet. App. at 35a; *accord id.* at 36a ("The record at this stage of the proceedings does not satisfy these requirements as they relate to plaintiffs' proposed activities.")). The day after the hearing—the Friday before the Tuesday election—the district court granted a preliminary injunction. (R.17, 18.) Respondents promptly appealed. (R.21.)

The district court never resolved the case on its merits; it ruled only on the preliminary injunction motion. With the interlocutory appeal pending, Petitioners obtained the requisite number of signatures. (Pet. at 13 n.4.) They then declared that the "case is now moot because Plaintiffs seek no further relief from this Court other than the awarding of expenses

and attorney's fees." (R.35:3.) The district court agreed and dismissed the case as moot. (R.39.)[2]

Notwithstanding the district court's dismissal, the Eleventh Circuit maintained jurisdiction over the then-pending interlocutory appeal because the issue was "capable of repetition, yet evading review." (Pet. App. at 5a n.5.) In June 2009, the Eleventh Circuit reversed the preliminary injunction order and upheld the statute. (*Id.* at 17a-18a.) The court concluded that "the sanctity of the voting process and the abuse it has historically faced must allow the Florida legislature to exercise some foresight, to take precautions, and to prohibit questionable conduct near polling places." (*Id.* at 18a.)

The Eleventh Circuit denied Petitioners' request for rehearing and took no further action. (Pet. App. at 45a-46a.) And because the district court had already dismissed the underlying case as moot, there was no

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[2] Seeking a final decision on the merits, and with the interlocutory appeal pending, Respondents separately appealed the district court's final order of dismissal. (R.42.) The Eleventh Circuit dismissed that appeal for lack of standing, concluding the district court's dismissal was not adverse to Respondents. (R.45.) Petitioners supported the Eleventh Circuit's dismissal, asserting that although they were the prevailing parties "on the substantive issues" and thus entitled to fees, Respondents were the prevailing parties "[i]n a technical sense" because of the dismissal for mootness. Appellees' Response to Jurisdictional Question, *Citizens for Police Accountability Political Comm. v. Browning*, Case No. 09-10002-D, at 5 & n.4 (11th Cir.), filed Feb. 2, 2009.

further activity below.[3] Petitioners now seek a writ of certiorari.

ARGUMENT

Petitioners complain of uncertainty surrounding a State's constitutional authority to restrict polling-place political activity. (Pet. at 16.) They also insist the decision below established a new legal standard, which affords certain types of speech more protection than others. (Pet. at 24.) But this area of the law is well established, and the legal issues below were neither novel nor complex. Courts evaluating similar challenges have applied this Court's precedent uniformly, consistently, and correctly. There is no uncertainty, no confusion, and no need for further review.

Moreover, even if this Court were inclined to revisit this area of the law, this case is not the appropriate vehicle. The district court based its decision on a limited preliminary injunction record, and because it subsequently dismissed the case as moot, there has been (and will be) no further activity below. This Court's review would be hampered by the absence of a properly developed record.

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[3] Petitioners' proposed amendment appeared on the November 3, 2009 ballot, not long after the Eleventh Circuit's mandate issued. The Fort Myers electors defeated the proposal 2,434 to 990 (71% to 29%). *See* Official Municipal Election Results, Nov. 3, 2009, available at www.leeelections.com/download/elhis09/091103/result2.html, last visited March 18, 2010.

A. There is No Uncertainty or Confusion Regarding Whether States Can Restrict Petition Gathering Within 100 Feet of Polling-Place Entrances.

Like many before it, this case involved a balancing of First Amendment freedoms. The First Amendment protects Petitioners' political solicitation, *Meyer v. Grant*, 486 U.S. 414, 425 (1988), but every citizen enjoys a fundamental right to vote. Indeed, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Courts routinely weigh competing constitutional interests, and they have consistently settled the balance of rights at issue here.

The challenged Florida statute broadly prohibits political solicitation and other activities within 100 feet of a polling-place entrance on Election Day.[4] *See* Fla. Stat. § 102.031(4) (2009). Nearly two decades ago, this Court upheld a Tennessee statute that likewise broadly prohibited political solicitation within 100 feet of a polling-place entrance on Election Day. *Burson v. Freeman*, 504 U.S. 191, 193 (1992) (plurality opinion). Numerous federal courts—including the

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[4] In addition to Election-Day voting, Florida offers early voting, which begins fifteen days earlier. Fla. Stat. § 101.657 (2009). The 100-foot restriction applies equally during the early voting period. *Id.* § 102.031(4).

Eleventh Circuit below—have applied *Burson* consistently and without difficulty. There is no uncertainty or confusion permeating this area of the law, and there is no need for this Court to revisit *Burson*.

The statute in *Burson* prohibited "the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question." *Id.* at 193-94. Wishing "to communicate with voters" notwithstanding the statute, plaintiff brought a facial challenge. *Id.* at 194. The Tennessee Supreme Court invalidated the statute, but this Court reversed. *Id.* at 211.

Concluding the statute was a content-based restriction on speech, the plurality applied strict scrutiny.[5] *Id.* at 198. It recognized a State's "compelling interest in preserving the integrity of its election process." *Id.* at 199 (quoting *Eu v. San Francisco County Dem. Cent. Comm.*, 489 U.S. 214, 231 (1989)). And it recognized an additional compelling interest in "protecting voters from confusion and undue influence." *Id.* These substantial interests were sufficient to sustain the statute. *Cf. McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 378 (1995) (Scalia, J., dissenting) ("So significant have we found the interest in

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[5] Only eight Justices participated in the *Burson* decision. Four joined the plurality opinion, with Justice Scalia concurring in the judgment. Justice Scalia agreed the statute was constitutional but would have applied a less exacting review than strict scrutiny. *Burson*, 504 U.S. at 216 (Scalia, J., concurring).

protecting the electoral process to be that we have approved the prohibition of political speech *entirely* in areas that would impede that process.") (citing *Burson*).

Applying a modified burden of proof, the plurality examined this country's (and the world's) long history of harms produced by political activity at polling places. History "reveals a persistent battle against two evils: voter intimidation and election fraud." *Burson*, 504 U.S. at 206. This history justified the statute; the Court required no additional evidence. "[B]ecause a government has such a compelling interest in securing the right to vote freely and effectively, this Court never has held a State 'to the burden of demonstrating empirically the objective effects on political stability that [are] produced' by the voting regulation in question." *Id.* at 208 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986)) (alteration in *Burson*); *accord Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1619 (2008) (upholding constitutionality of photo identification requirement based on nation's history of fraud, notwithstanding fact that "[t]he record contain[ed] no evidence of [in-person voter impersonation] fraud actually occurring in Indiana at any time in its history").

The *Burson* plurality concluded that a "long history" and "simple common sense" demonstrate "that some restricted zone around polling places is necessary to protect [the] fundamental right [to vote]." 504 U.S. at 211. Accordingly, "requiring solicitors to stand

100 feet from the entrances to polling places does not constitute an unconstitutional compromise." *Id.* *Burson* left no confusion, and neither courts nor legislatures have struggled to follow it.

The statute in *Burson* was not unique. As the plurality observed, "all 50 States limit access to the areas in or around polling places." *Id.* at 206; *see also id.* at 211 (observing "substantial consensus" regarding restricted zones). That remains true today. *See* Appendix. Twenty-one states restrict political speech within a 100-foot radius[6]—the "minor geographic limitation" approved in *Burson,* 504 U.S. at 210. Seventeen restrict larger areas.[7] Still others restrict

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[6] *See* Ark. Code Ann. § 7-1-103(a)(9)(A); Ca. Elec. Code § 18370; Colo. Rev. Stat. § 1-13-714; Fla. Stat. 102.031(4); Idaho Code § 18-2318(1); 10 Ill. Comp. Stat. 5/7-41; Md. Code Ann., Election Law § 16-206; Mich. Comp. Laws § 168.744; Minn. Stat. § 204C.06, Subd. 1; Mont. Code Ann. § 13-35-211; Nev. Rev. Stat. § 293.361; N.J. Stat. Ann. § 19:34-7; N.M. Stat. Ann. § 1-20-16; N.Y. Election Law § 5-204; N.D. Cent. Code § 16.1-10-06.2; Ohio Rev. Code Ann. § 3501.30, 35; Or. Rev. Stat. § 260.695; S.D. Codified Laws § 12-18-3; Tenn. Code Ann. § 2-7-111(b); Tex. Elec. Code Ann. § 85.036; Wisc. Stat. § 12.03.

[7] *See* Alaska Stat. § 15.15.170 (200 feet); Ga. Code Ann. § 21-2-414 (150 feet); Haw. Rev. Stat. § 11-132(a) (200 feet); Iowa Code § 39A.4 (300 feet); Kan. Stat. Ann. § 25-2430 (250 feet); Ky. Rev. Stat. Ann. § 117.235(3) (300 feet); La. Rev. Stat. Ann. § 18:1300.6 (600 feet); Me. Rev. Stat. Ann. tit. 21-A, § 682 (250 feet); Mass. Gen. Laws ch. 54, § 65 (150 feet); Miss. Code Ann. § 23-17-57(4) (150 feet); Neb. Rev. Stat. § 32-1524(2) (200 feet); Okl. Stat. tit. 26, § 7-108 (300 feet); S.C. Code Ann. § 7-25-180 (200 feet); Utah Code Ann. § 20A-3-501(2)(a) (150 feet); Wash. Rev. Code § 29A.84.510(1) (300 feet); W. Va. Code § 3-1-37 (300 feet); Wyo. Stat. Ann. § 22-26-113 (300 feet).

smaller areas ranging from ten to seventy-five feet.[8] But all fifty states seemingly recognize that "some restricted zone [around voting booths] is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud," *Burson*, 504 U.S. at 206.[9] No state permits unfettered political activity in or around polling places.

The national consensus and the courts' consistency are noteworthy. Despite claiming confusion and uncertainty, Petitioners cite no post-*Burson* decision invalidating a restriction on petition gathering (or other political activity) within 100 feet of a polling place. Indeed, in the eighteen years since *Burson*, no court has done so—save the district court below.

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[8] *See, e.g.*, Ala. Code § 17-9-50 (30 feet); Ariz. Rev. Stat. § 16-515 (75 feet); Conn. Gen. Stat. § 9-236(a) (75 feet); Del. Code Ann. tit. 15, § 4933 (50 feet); Ind. Code § 3-14-3-16 (50 feet); Mo. Rev. Stat. § 115.637 (25 feet); 25 Pa. Cons. Stat. § 3060 (10 feet); R.I. Gen. Laws § 17-19-49 (50 feet); Va. Code Ann. § 24.2-604 (40 feet).

[9] Petitioners mistakenly suggest that Florida's polling-place restriction is of recent vintage. (Pet. at 5 (stating Florida's first regulation of petition circulation outside polling places was in 1977)). As early as 1895, Florida restricted access to the areas near polling places. *See* Act of May 25, 1895, ch. 4328, § 39, 1895 Fla. Laws 56, 76 ("No person shall be permitted under any pretext whatever to come within fifteen feet of any door or window of any polling room from the opening of the polls until the completion of the count. . . ."). Moreover, Petitioners' attribution of the restriction enacted in 1977 to a "disgruntled Legislature," (Pet. at 5), requires a gross misreading of the cited decision. *See Clean-up '84 v. Heinrich*, 590 F. Supp. 928, 929 (M.D. Fla. 1984).

B. Courts of Appeals Have Unanimously Upheld Petition-Gathering Restrictions.

Given *Burson*'s clarity, it is not surprising that courts have applied it consistently. The Eleventh Circuit's decision is in harmony with those of the two other Courts of Appeals to have considered the issue. Rather than "struggle[ ] to find this balance," (Pet. at 15), courts have uniformly applied *Burson* to uphold polling-place restrictions of political activity.

The Sixth Circuit upheld Ohio's 100-foot protected zone, inside which no person could solicit petition signatures or votes. *See United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 741 (6th Cir. 2004). Plaintiffs—like Petitioners here—hoped to gather petition signatures inside Ohio's "campaign-free zones." *Id.* But the court concluded that, "[i]n keeping with *Burson*," a state may require signature gatherers to stand 100 feet from polling places without "running afoul of the Constitution." *Id.* at 748.

Earlier, the Fifth Circuit reached the same conclusion—upholding a 600-foot protected zone. *See Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993), *cert. denied*, 511 U.S. 1017 (1994). Political activists wanted to circulate recall petitions on Election Day within Louisiana's 600-foot protected zone. *Id.* at 118-19. The Fifth Circuit characterized the restriction as "posit[ing] the First Amendment's guarantee of the right to free speech against the state's attempt to secure its citizens' right to vote in an environment

free from intimidation, harassment, confusion, obstruction, and undue influence." *Id.* at 119. The court then turned to *Burson*: "This conflict of First Amendment rights necessarily requires a compromise between the two. The Supreme Court addressed this issue head on . . . in *Burson*." *Id.* at 119-20 (citation omitted).[10] The court found Louisiana had a "compelling interest in maintaining campaign-free zones on election day," and it upheld the statute. *Id.* at 119.

The Eleventh Circuit's decision is consistent with *Burson*, *United Food*, and *Schirmer*. Each of these rejected arguments that Petitioners here offered, and each upheld a content-based statute restricting political activities near polling places. In this case, the Eleventh Circuit reversed the only court—at least since *Burson*—to invalidate a restriction on political activities within 100 feet of polling places. There is uniformity in the law, and additional review is unnecessary.

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[10] After the Fifth Circuit decided *Schirmer*, the Louisiana Supreme Court invalidated the 600-foot restriction, but only because it was so much larger than the protected zone approved in *Burson*:

> Although we do not regard as unduly onerous such a prohibition (on all political activity) within the narrow confines approved in *Burson* (100 feet), when that blanket proscription on political speech is extended to 600 feet we find that "a difference only of degree" becomes a difference of kind, a difference of "constitutional dimension."

State v. Schirmer, 646 So. 2d 890, 901 (La. 1994) (quoting *Burson*).

C. The Eleventh Circuit Applied the Correct Legal Standard.

Petitioners next contend that the Eleventh Circuit erroneously created a new standard under which exit polling is not restricted, but political speech is. (Pet. at 24.) That Florida's statute is content based is not novel—it is consistent with *Burson*. *Burson* rejected the argument that "the failure to regulate all speech render[ed] the statute fatally underinclusive." *Burson*, 504 U.S. at 207. "The First Amendment does not require States to regulate for problems that do not exist." *Id.* And since *Burson*, courts have treated exit polling and political speech differently.

Petitioners continue to suggest that "there is no constitutionally meaningful difference between" exit polling and their political solicitation. (Pet. at 26.) This wishful declaration is contrary to numerous decisions, including several on which Petitioners rely. *See, e.g.*, *Burson*, 504 U.S. at 207 (no evidence of fraud caused by exit pollsters, unlike political workers); *Schirmer*, 2 F.3d at 122 ("We reject the application of the exit-polling cases to the present context [signature gathering] because the underlying state interests differ in each case."); *ABC v. Blackwell*, 479 F. Supp. 2d 719, 738 (S.D. Ohio 2006) ("[E]xit polling cannot reasonably be construed as a form of electioneering under any definition of that term."); *CBS v. Cobb*, 470 F. Supp. 2d 1365, 1371 (S.D. Fla. 2006) ("[E]xit polling is significantly distinguishable from the electioneering and campaigning [in *Burson*].").

The Eleventh Circuit likewise recognized the distinction: "[E]xit polling does not include advocating for the success of some political proposal or candidate." (Pet. App. at 12a n.11.) "Moreover, the plurality in *Burson* expressly said that the Tennessee statute did not need to prohibit exit polling to survive strict-scrutiny review." (*Id.*) Exit polling is different, and courts and legislatures have treated it so.[11]

Petitioners also mistakenly suggest that the Eleventh Circuit "re-define[d] the compelling state interest endorsed by *Burson*" because the opinion was "actually grounded" in interests not recognized by *Burson*. (Pet. at 26.) Petitioners misread the Eleventh Circuit's opinion: "The State contends that it shares the same compelling interests as Tennessee in *Burson*: (1) protecting voters from confusion and undue influence; and (2) preserving the integrity of the

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[11] Florida is hardly alone in expressly excepting exit polling from polling-place restrictions. *See, e.g.*, Del. Code Ann. tit. 15, § 4933(b-c); Me. Rev. Stat. Ann. tit. 21-A, § 682(2); Neb. Rev. Stat. § 32-1525; Okl. Stat. tit. 26, § 7-108.1; Wyo. Stat. Ann. § 22-26-113. Moreover, Petitioners overstate the significance of the exit-polling exception, contending that the absence of a statutory definition allows political operatives to abuse the exception. (Pet. at 24-25.) No statutory definition is necessary: an exit poll is "[a]n unofficial poll in which people leaving a polling station are asked how they have voted, used in predicting the result of an election." *OXFORD ENGLISH DICTIONARY (2d Ed., Vol. V 1989)*. Other types of polls—such as political "push polls" Petitioners reference (Pet. at 25)—are prohibited by the statute. *See* Fla. Stat. § 102.031(4)(b) (2009) (prohibited solicitation includes conducting polls other than exit polls).

election process. Plaintiffs take no issue with the presence or legitimacy of those compelling interests in this case. Nor do we." (Pet. App. at 11a.) The Eleventh Circuit did not redefine any standard; it faithfully applied *Burson*.

Finally, Petitioners incorrectly contend the Eleventh Circuit did not consider their constitutional rights. (Pet. at 15.) In fact, the court "accept[ed] that the right to engage in political discourse is 'the essence of self-government.'" (Pet. App. at 17a (quoting *Garrison v. Louisiana*, 309 U.S. 81 (1964))). But the court—just as in *Burson*—had to balance competing interests: "The Florida statute . . . balances the right to engage in political speech against the right to vote without interference and harassment . . . ." (Pet. App. at 17a.) The court's balancing was consistent with *Burson* and consistent with the First Amendment.

D. This Case Presents a Poor Means of Reviewing the Question Presented.

Even if the Court determined that the issue presented in this case warranted review, this is not an appropriate case in which to undertake that review. The order challenged here is interlocutory, not final, and does not fall within the narrow class of cases in which the Court has found interlocutory review to be warranted. Moreover, this case will never reach final judgment. Based upon Petitioners' representation that they sought no further relief (beyond attorney's fees), the district court dismissed the

underlying case as moot. (R.39.) Therefore, if this Court grants the petition, it will be spending its precious resources reviewing a preliminary determination in a case Petitioners themselves have abandoned on the merits.

This Court does not commonly review the grant or denial of a preliminary injunction. This is because preliminary proceedings by their nature are accelerated and abbreviated, not lending themselves to the creation of a proper record upon which to decide important issues. Because the purpose of a preliminary injunction is "merely to preserve the relative positions of the parties until a trial on the merits can be held . . . and [because of] the haste that is often necessary if those positions are to be preserved," preliminary injunctions are often granted with less formality and less complete evidence than a trial on the merits. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). These characteristics provide less than ideal ingredients for meaningful appellate review. *See id.* at 396 (because parties to preliminary injunction proceeding generally do not have a full opportunity to present their cases, even where injunctive aspects of case become moot, any remaining issues generally must be resolved in a trial on the merits rather than by appeal); *see also City of Hammond v. Schappi Bus Line, Inc.*, 275 U.S. 164, 171-72 (1927) (declining to reach novel and far-reaching questions raised in review of preliminary injunction proceeding until the facts essential to their decision were "definitely found by the lower courts upon adequate evidence").

The proceedings below were typical of expedited preliminary injunction proceedings. Petitioners initiated the action just fifteen days before the primary election, Secretary Browning filed his responsive memorandum the next week, and the hearing followed two days later. (R. 1:¶ 14, R.11, R.15.) There was no discovery. Both sides submitted legal arguments and witness declarations, but neither presented live testimony. (R.2, Exh. A-B; R.9, 11, 15.) The district court rendered its decision the day after the hearing—the Friday before the Tuesday primary election. (Pet. App. at 42a-44a.) The court concluded that Respondents had not made a sufficient showing to support the challenged law "at this stage of the proceedings." (*Id.* at 35a.)

In this Court, Petitioners repeatedly cite and attempt to rely upon "record evidence" adduced—or not adduced—in the proceedings below. (*See, e.g.*, Pet. at 9 ("Petitioners presented a variety of statistical, geographic, and affidavit evidence demonstrating that . . . ."); *id.* at 11 ("Respondents provided only anecdotal affidavit evidence."); *id.* at 11 (noting Respondents' affidavits were not "supported by any documentary evidence")). They even state that "the record evidence in this case is that petition circulators in Florida have not caused any electoral abuses," and suggest that the district court's "findings of fact stood on appeal." (*Id.* at 13 n.5, 23-24.) But Petitioners wholly ignore the preliminary posture of the case and the effect of this posture on the appropriateness of Supreme Court review.

This Court has found it appropriate to review interlocutory orders in certain limited circumstances, none of which is present here. Review is warranted when the issue presented is "fundamental to the further conduct of the case." *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377 (1945)). This consideration is not present here, as the underlying case was dismissed as moot. Review of an interlocutory decision also may be warranted when the decision raises important questions of jurisdiction that ostensibly conflict with the decisions of other circuits. *See Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 192-93 (1974). The issues raised in the present appeal do not relate to jurisdiction and, as discussed in Section B, *supra*, there is no conflict with other circuits. This case presents none of the special circumstances this Court has identified as warranting review of an interlocutory order.

Additionally, Respondents lost any ability to present a case on the merits when Petitioners abandoned their case below. (*See* Pages 2-3 & n.2, *supra*.) At Petitioners' urging, the district court dismissed the case as moot while the interlocutory appeal proceeded. (R.39; *see also* Note 2, *supra*.) Ordinarily, when an underlying case becomes moot while an appeal from a preliminary injunction order is pending, it is appropriate to vacate the judgment below. *See, e.g., United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950). This procedure "clears the path for future relitigation of the issues between the parties" and eliminates a judgment which, by "happenstance,"

was not subject to review. *Id.* at 40. Neither side has urged that result in this case. Respondents successfully argued that the Eleventh Circuit had jurisdiction because the dispute was "capable of repetition, yet evading review." (Appellants' Initial Br., *Citizens for Police Accountability Political Comm. v. Browning*, Case No. 08-15115-D, at 1-2 (11th Cir.), filed Nov. 3, 2008; Pet. App. at 5a n.5.) Petitioners did not affirmatively assert application of this doctrine, but neither did they seek dismissal of the interlocutory appeal. Indeed, by pursuing a writ of certiorari in this Court, Petitioners implicitly assert the applicability of this mootness exception. Yet they affirmatively asserted mootness as the ground for declining to proceed to a trial on the merits, and for dismissal of Respondents' separate appeal of the dismissal order. (R.35:3; R.39; Note 2, *supra*.)

It would be anomalous if, by asserting mootness to justify abandoning pursuit of a final judgment—but not asserting mootness for purposes of the Eleventh Circuit's review of the preliminary injunction—Petitioners could not only escape the ordinary result of having the order vacated but also successfully obtain this Court's rare review of an interlocutory order on a limited trial court record.

For all of these reasons—the interlocutory nature of the order to be reviewed, the limited proceedings below, and Petitioners' subsequent abandonment of the case on the merits—this case is not an appropriate one for this Court's review of the question presented.

CONCLUSION

This case requires no additional review. The Eleventh Circuit's decision faithfully applied this Court's precedent and was consistent with decisions of other Courts of Appeals. This area of the law is well settled, certain, and clear. Moreover, even if clarification were required, this is not an appropriate case to supply it. The district court issued its preliminary order—based on a limited factual record—just days after the case began, and the case never reached final judgment. This Court should deny the petition.

Respectfully submitted,

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Appendix:
Survey of Polling-Place Restrictions

Ala. Code § 17-9-50	"[N]o person shall be permitted within 30 feet of the door of the building of the polling place."
Alaska Stat. § 15.15.170	"[A] person . . . within 200 feet of any entrance to the polling place may not attempt to persuade a person to vote for or against a candidate, proposition, or question."
Ariz. Rev. Stat. § 16-515(A)	"[A] person shall not be allowed to remain inside the seventy-five foot limit . . . and . . . no political or electioneering materials may be displayed within the seventy-five foot limit."
Ark. Code Ann. § 7-1-103(a)(9)(A)	"[N]o person shall . . . solicit signatures on any petition . . . or do any electioneering of any kind whatsoever in the building or within one hundred feet (100') of the primary exterior entrance . . . ."
Ca. Elec. Code § 18370	"No person . . . shall, within 100 feet of a polling place . . . [c]irculate an initiative, referendum, recall, or nomination petition or any other petition . . . [or d]o any electioneering . . . ."
Colo. Rev. Stat. § 1-13-714	"No person shall do any electioneering . . . within one hundred feet of any building in which a polling place is located . . . . 'Electioneering' also includes soliciting signatures . . . ."

Conn. Gen. Stat. § 9-236(a)	"[N]o person shall . . . loiter or peddle or offer any advertising matter, ballot or circular to another person within a radius of seventy-five feet . . . ."
Del. Code Ann. tit. 15, § 4933	"(b) No other person except as noted below shall be permitted within 50 feet of any entrance to the building used by voters. (c) Media and persons conducting exit polls shall be permitted within the 50-foot exclusion zone."
D.C. Mun. Regs. tit. 3, § 708.4	"No partisan or nonpartisan political activity . . . shall be permitted . . . within [50 feet] outside the building . . . ."
Ga. Code Ann. § 21-2-414	"(a) No person shall solicit votes in any manner . . . [w]ithin 150 feet of the . . . polling place is established . . . . (b) No person shall solicit signatures for any petition on any primary or election day . . . [w]ithin 150 feet . . . ."
Haw. Rev. Stat. § 11-132(a)	"Any person who remains or loiters within an area of two hundred feet from the . . . polling place and its appurtenances for the purpose of campaigning shall be guilty of a misdemeanor."

Idaho Code § 18-2318(1)	"[N]o person may, . . . within one hundred (100) feet [of a polling place]: (a) Do any electioneering; (b) Circulate cards or handbills of any kind; [or] (c) Solicit signatures to any kind of petition . . . ."
10 Ill. Comp. Stat. 5/7-41(c)	"No person shall do any electioneering or soliciting of votes . . . within one hundred feet of any polling place . . . ."
Ind. Code § 3-14-3-16(b)	"A person who knowingly does any electioneering: . . . within . . . the chute [defined as area fifty feet from the entrance to the polls, *see* Ind. Code. § 3-5-2-10] . . . commits a Class A misdemeanor."
Iowa Code § 39A.4.1.a. (1)	"Loitering, congregating, electioneering, posting signs, treating voters, or soliciting votes . . . , either on the premises of a polling place or within three hundred feet . . . [is unlawful]."
Kan. Stat. Ann. § 25-2430	"(a) Electioneering is knowingly attempting to persuade or influence eligible voters . . . within a radius of 250 feet from the entrance. (c) Electioneering is a class C misdemeanor."
Ky. Rev. Stat. Ann. § 117.235(3)	"No person shall electioneer . . . within a distance of three hundred (300) feet [of the polling-place entrance] . . . . Electioneering shall include . . . the soliciting of signatures to any petition . . . ."

La. Rev. Stat. Ann. § 18:1300.6	"It shall be unlawful for any person to circulate recall petitions . . . within a radius of six hundred feet of the entrance to any polling place . . . ."
Me. Rev. Stat. Ann. tit. 21-A, § 682(2)	"On public property within 250 feet of the entrance to the voting place . . . a person may not: A. Influence another person's decision regarding a candidate or question that is on the ballot . . . ."
Md. Code Ann., Election Law § 16-206	"A person may not: . . . canvass, electioneer, or post any campaign material in the polling place or beyond a line established by signs posted . . . . The line shall be located as near as practicable to 100 feet from the entrance . . . ."
Mass. Gen. Laws ch. 54, § 65	"No person shall be allowed to collect signatures upon petitions . . . within one hundred and fifty feet from the building entrance door to a polling place."
Mich. Comp. Laws § 168.744	"[Any person] within 100 feet from any entrance . . . shall not persuade or endeavor to persuade a person to vote for or against any particular candidate . . . . A person shall not . . . request or obtain signatures on petitions . . . within 100 feet from any entrance . . . ."

Minn. Stat. § 204C.06, Subd. 1	"No one except an election official or an individual who is waiting to register or to vote shall stand within 100 feet of the building in which a polling place is located."
Miss. Code Ann. § 23-17-57(4)	"It is unlawful for any person to solicit signatures on any petition . . . within one hundred fifty (150) feet of any polling place on any election day."
Mo. Rev. Stat. § 115.637 (18)	"[E]lectioneering, distributing election literature, [or] posting signs . . . with respect to any candidate or question to be voted on at an election on election day . . . within twenty-five feet of the building's outer door . . . [is unlawful]."
Mont. Code Ann. § 13-35-211(1)	"A person may not do any electioneering on election day within . . . 100 feet of any entrance . . . ."
Neb. Rev. Stat. § 32-1524(2)	"No person shall do any electioneering, circulate petitions, or perform any action that involves solicitation . . . within two hundred feet of any such polling place or building."
Nev. Rev. Stat. § 293.361	"[A] person may not electioneer for or against any candidate, measure or political party in or within 100 feet from the entrance to the voting area."

N.H. Rev. Stat. Ann. § 659:43(II)	"No person who is a candidate for office or who is representing or working for a candidate shall . . . perform any electioneering activities . . . within a corridor 10 feet wide and extending a distance from the entrance door . . . ."
N.J. Stat. Ann. § 19:34-7	"[N]or shall any person within the polling place or within a hundred feet thereof, loiter, electioneer, or solicit any voter."
N.M. Stat. Ann. § 1-20-16	"Electioneering too close to the polling place consists of any form of campaigning on election day within one hundred feet of the building . . . ."
N.M. Stat. Ann. § 1-20-17	"Obstructing the polling place consists of . . . approaching nearer than fifty feet from any polling place . . . ."
N.Y. Election Law § 5-204(9)	"[N]o person shall do any electioneering within the polling place, or within a one hundred foot radial . . . ."
N.C. Gen. Stat. § 163-166.4(a)	"No person . . . shall . . . solicit votes, or otherwise engage in election-related activity in the voting place or in a buffer zone . . . . In determining the dimensions of that buffer zone . . . [officials] shall, where practical, set the limit at 50 feet from the door of entrance to the voting place . . . ."

N.D. Cent. Code § 16.1-10-06.2	"A person may not approach a person attempting to enter a polling place . . . or who is leaving a polling place for the purpose of gathering signatures for any reason. These prohibitions apply in any polling place or within one hundred feet [30.48 meters] from any entrance . . . ."
Ohio Rev. Code Ann. § 3501.35 (A)	"[N]o person shall . . . engage in any kind of election campaigning within the area between the polling place and the small flags of the United States . . . . [which shall be 100 feet from the polling place, *see* Ohio Rev. Code Ann. § 3501.30]."
Okl. Stat. tit. 26, § 7-108	"No person shall be allowed to electioneer within three hundred (300) feet of any ballot box . . . ."
Or. Rev. Stat. § 260.695(2)	"A person may not do any electioneering, including . . . soliciting of signatures to any petition, . . . within 100 feet . . . ."
25 Pa. Cons. Stat. § 3060(d)	"All persons . . . must remain at least ten (10) feet distant from the polling place during the progress of the voting."

R.I. Gen. Laws § 17-19-49	"No poster, paper, circular, or other document designed or tending to aid, injure, or defeat any candidate for public office or any political party on any question submitted to the voters shall be distributed or displayed within the voting place or within fifty (50) feet of the entrance . . . ."
S.C. Code Ann. § 7-25-180(A)	"It is unlawful on an election day within two hundred feet of any entrance . . . to distribute any type of campaign literature or place any political posters."
S.D. Codified Laws § 12-18-3	"[N]o person may . . . within one hundred feet from any entrance leading into a polling place, . . . display campaign posters, signs, . . . or conduct any petition signature gathering . . . ."
Tenn. Code Ann. § 2-7-111(b)	"Within the appropriate boundary [100 feet], . . . the display of campaign posters, signs or other campaign materials . . . are prohibited . . . . [A] solicitation or collection for any cause is prohibited."
Tex. Elec. Code Ann.§ 61.003(a)	"A person commits an offense if . . . within 100 feet of an outside door through which a voter may enter the building in which a polling place is located, the person . . . electioneers for or against any candidate, measure, or political party."

Utah Code Ann. § 20A-3-501(2)(a)	"A person may not, . . . within 150 feet of the building where a polling place is located: (i) do any electioneering; [or] . . . (iii) solicit signatures to any kind of petition . . . ."
Vt. Stat. Ann. tit. 17, § 2508(a)	"[Official to insure that] [w]ithin the building containing a polling place, no campaign literature, . . . or other political materials are displayed, placed, handed out or allowed to remain; and . . . On the walks and driveways leading to a building in which a polling place is located, no candidate or other person may physically interfere with the progress of a voter to and from the polling place."
Va. Code Ann. § 24.2-604(A)	"[I]t shall be unlawful for any person (i) to loiter or congregate within 40 feet of any entrance of any polling place; [or] (ii) within such distance to give . . . campaign material to any person or to solicit or in any manner attempt to influence any person in casting his vote . . . ."
Wash. Rev. Code § 29A.84.510(1)	"[N]o person may . . . in any public area within three hundred feet of any entrance to such polling place: (a) Suggest or persuade or attempt to suggest or persuade any voter to vote for or against any candidate or ballot measure; [or] . . . (c) Solicit signatures to any kind of petition . . . ."

W. Va. Code § 3-9-9	"No person may do any electioneering on election day . . . within three hundred feet of the outside entrance to the . . . polling place."
Wisc. Stat. § 12.03(2)(b)1	"No person may engage in electioneering during polling hours on any public property on election day within 100 feet of an entrance to a building containing a polling place."
Wyo. Stat. Ann. § 22-26-113	"Electioneering too close to a polling place on election day . . . consists of any form of campaigning, . . . the soliciting of signatures to any petition or the canvassing or polling of voters, except exit polling by news media, within one hundred (100) yards of the building . . . ."